U.S. Department of Justice

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Washington, D.C. 20530

May 12, 1983

Edward J. Schwartzbauer, Esq.
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2200 First Bank Place East
Minneapolis, Minn. 55402

Re: United States v. Reilly Tar & Chemical Corporation

Dear Ed:

You misconstrued my May 10 letter (corrected copy May 11). I did not say that the United States is unwilling to meet with Reilly to discusss settlement. I merely stated that the United States is unwilling to meet with Reilly under the terms and conditions which you are attempting to thrust upon us without prior agreement.*/ Accordingly, I renew my invitation to meet with you to discuss settlement at a time and place which is mutually convenient, if, of course, you will allow me to choose who will attend on behalf of the United States. In fact, I extend an offer to play host to such a meeting here in Washington.

If there has been a misunderstanding between us about the nature of the Reilly proposal, I am truly sorry. I did attend the August 24, 1982 meeting and my colleagues and I left with the clear understanding that Reilly had agreed to give us a settlement offer, not simply an "action plan". The use of the phrase "comprehensive solution" in the correspondence did not conflict with that understanding. I understood your promise of a "comprehensive solution to perceived public health and environmental problems at [the] site in St. Louis Park" to include an indication of what work Reilly is willing to do and what costs it is willing to bear. I cannot see how a solution can be comprehensive without including a statement of who bears the cost. Moreover, if you will recall, I used the phrase "settlement proposal" in my letter to you of

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*/ Although it is not the reason for our decision not to attend your programs on May 18 and 19, I must point out that I have a prior engagement to spend those days in Pittsburgh at an important meeting in another case.

December 6, 1982 to describe the program which Reilly was planning to propose. If I was laboring under a misimpression, that would have been an appropriate time for you to have corrected me.

In any event, Reilly's unwillingness to say what it is willing to pay for is puzzling. It is hard to believe that Reilly would spend, as you say, half a million dollars on an "action plan" and not consider what costs it is willing to cover. You must have considered the costs which Reilly is willing to bear. Why won't you tell us?

I have not practiced law as long as you, but in my career, I have never attended a settlement discussion at which the defendant was unwilling to make some proposal as to what it would pay or do to settle the case. I do not understand how settlement negotiations can be otherwise productive. I do not see the point of negotiating separately what is to be done and who will pay for it. It seems to me to be a duplicative effort.

I must point out that the approach you suggest, that we discuss only your action plan without considering who will bear the costs, is contrary to the intent of CERCLA. Section 104(a)(1) of CERCLA gives a responsible party, such as Reilly, the opportunity under certain circumstances, to take remedial action before the United States does, but does not give a responsible party the right to tell the United States what should be done, if that party is unwilling to bear the costs.

Finally, I feel it appropriate to advise you that if what you are presenting is, as you say, an action plan, and not a settlement proposal, it will be fully admissable in court and not barred by Rule 408 of the Federal Rules of Evidence. Accordingly, I would suggest that it would behoove Reilly to couple its action plan with a settlement offer before it is made public on May 18.

In closing, I reiterate my offer to meet with you at a mutually agreeable time and place to discuss any genuine

settlement offer Reilly wishes to make and I offer Washington as a site for these meetings. I hope you will take up my offer soon.

Sincerely yours,

Assistant Attorney General
Land and Natural Resources Division

By: David Hird

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